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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 589

JOSEPH SALARDINO, PETE M. MAZONE, MICHAEL E. PAULDINO, ALBERT F. GUARASCI, CLARENCE M. SMALDONE, PAUL C. VILLANO, JOHN VICTOR RUSSOMANO, and ROBERT QUINTANA, *Petitioners,*

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a Municipal Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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SUPPLEMENTAL STATEMENT OF THE CASE

Lieutenant Duane L. Borden, an officer authorized by law to execute warrants within the City and County of Denver, presented to a Denver magistrate his affidavit for search warrant of the premises at 3700 Navajo Street, Denver, Colorado (Appendix A to Petition to this Court for Writ of Certiorari, p. 1a). The affi-

davit was supported by information as to gambling on the premises given affiant by a previously reliable source or sources (Appendix B-11, pp. 16a-17a), together with the observations of officers (Apps. B-1 to B-16, pp. 2a-24a), including those of the affiant (Apps. B-4, B-7, B-8 to B-9, B-12, B-13 to B-14, B-15 to B-16, pp. 6a, 10a-13a, 17a-21a, 23a-24a), that the premises, a political or social club, was being maintained or frequented by gamblers.

In the execution of the warrant that issued, Lieutenant Borden and other officers knocked on the door of the club, announced the presence of the police and their authority, heard the sound of running feet, and gained entry by breaking in (Appendix 1, p. 1a, this brief, R. p. 242).

When the Superior Court of the City and County of Denver had read the record and briefs of counsel and on appeal sustained the judgment of the County Court adverse to the petitioners, the Supreme Court of Colorado *en banc* denied certiorari (App. 2, p. 2a).

SUMMARY OF ARGUMENT

The affiant's personal and direct observations of the premises prior to and after the very specific information he received from previously reliable sources confirmed the reliability of the information.

The magistrate need not have required the affidavits of other officers to be produced or that the affiant personally made inquiries about the premises, as here the affiant did, to afford a substantial basis for the belief that illegal activity was there being carried on.

If the standards set forth in 18 U.S.C. § 3109 for the execution of search warrants are applicable to the

states, they were complied with by the affiant's loudly announcing the presence of the police and his authority; and denial of permission to enter, justifying use of force to prevent the destruction of evidence, may be implied from the commotion that followed.

Some of the petitioners were not prejudiced by being charged with frequenting a gambling house, when that was one of the ways in the disjunctive of establishing guilt under an ordinance.

A rule of an appellate state court dispensing with oral argument on briefs, excepting when deemed necessary by the court, deprived the petitioners of no constitutional right to counsel since the rule applies equally to all counsel.

ARGUMENT

I

The Magistrate Could Rely on the Specific Information of Unknown Sources, Stated by the Affiant To Be Reliable in the Past, When the Reliability of the Information Was Confirmed in This Case by the Observations of the Affiant Prior and Subsequent to His Receiving the Information.

Reason I of the Petition for Certiorari contends that the issuance of the search warrant on the basis that the affidavit supported probable cause conflicts with *McCray* v. *Illinois*, 386 U.S. 300 (1967). The argument here is that nowhere in the affidavit is there a showing that the informant had been the source of trustworthy information on previous occasions. Overlooked in this argument is Lieutenant Borden's statement that he had received upon at least two occasions information from previously reliable sources, setting forth what the informant or informants said in specific detail, briefly, that gamblers were engaging in large

stake dice games upon the premises (App. B-11, pp. 16a-17a).

The reliability and credibility of these statements had already been confirmed by Lieutenant Borden by his several previous observations of the presence and activity of known gamblers there (Apps. B-4, B-7, B-8, to B-9, pp. 6a, 10a-13a). His observations subsequent to receiving the information also confirm the specific information he had received (Apps. B-12, B-13 to B-14, B-15 to B-16, pp. 17a-21a, 23a-24a). Here the information was substantiated by the observations of the police, more than they were in *McCray* v. *Illinois, supra,* at 302, wherein the Court affirmed the decision of the state court.

II

The Affidavits of Persons Other Than the Affiant Were Not Required When His Direct and Personal Inquiries Supported Probable Cause.

Reason II assigned in the Petition for granting certiorari is that Lieutenant Borden's affidavit, that illegal activity was being conducted at the club, was grounded upon unsworn factual recitals and surmise of other persons. This argument again overlooks the extent of the affiant's own observations. His surveillances, by visual observation and recognition and check of license plates and records, established that the premises were frequented, guarded and maintained by many known gamblers, including the petitioners (Apps. B-4, B-7, B-8 to B-9, B-12, B-13 to B-14, B-15 to B-16, pp. 6a, 10a-13a, 17a-21a, 23a-24a). This affiant's information from reliable source set forth what was actually said as was corroborated by other source (App. B-11, pp. 16a-17a), also by police surveillance (Apps. B-1 to B-16, pp. 2a-24a). Probable cause was estab-

lished if the affiant had not made inquiries, *Jones* v. *United States,* 362 U.S. 257, 271-272 (1960). Here, moreover, the affiant's direct and personal inquiries substantiated the information he had received from other corroborative sources.

III

Those Petitioners Charged With Frequenting a Gambling Establishment Were Specifically Advised of the Nature and Cause of the Accusation Against Them.

It is urged in Reason III that frequenting a gambling house is only a way of establishing guilt under § 821.10 of the ordinances of the City and County of Denver (App. E, p. 29a). It is contended that some of the petitioners should have been generally charged with being professional gamblers, when their right is to have delineated, with particularity, the nature and cause of their accusation, *In Re Gault,* 387 U.S. 1, 33 (1967). These petitioners cannot complain of being charged with and tried on a specific element when elements in the disjunctive are in the ordinance. They were not prejudiced by being specifically, rather than only generally, charged.

IV

No Constitutional Right to Counsel Was Denied Petitioners by an Appellate Rule Dispensing With Oral Argument on Briefs.

Reason IV raises a contention that the Superior Court's denial of a motion for oral argument on appeal deprived petitioners of full right to counsel. 5 C.J.S., Appeal and Error, § 1401(b) states a general rule of appellate practice as follows:

> "Generally the right to make an oral argument in an appellate court exists only in accordance

> with the provisions of the applicable statutes or rules of court . . ."

and in Colorado, Rule 18 of the Superior Court provides:

> "Disposition of appeals from the County Court will be based on review of written briefs and record. Oral argument will be dispensed with unless the Court deems it necessary."

In Re Gault, supra, at 58, reiterated that the Court has not held that a State is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all." Where appellate review is provided, it of course must apply equally, but here the rule applies to all counsel alike. The petitioners were not by this rule denied either due process or equal protection of the law.

V

After Loudly Announcing Their Presence and Authority, the Officers Were Justified Under Federal Standards in Using Force To Gain Entry in View of the Commotion That Followed Inside, Reasonably Indicating a Destruction of Evidence.

Reason V urges that federal standards relating to search warrants should be applied uniformly to the states, and that officer Borden therefore made, improper execution of the warrant, because under 18 U.S.C. § 3109 force can be used only when peaceful execution has been denied through acts of persons. We examine the evidence and federal cases as to this contention.

Officer Borden testified that, after knocking, and loud announcement of his authority and purpose, all

that he could hear was a lot of noise, sounding like running feet and scurrying, inside (App. 1, p. 1a, R. p. 242).

In *McClure* v. *United States,* 332 F. 2d 19, 22 (9th Cir. 1964), it was pointed out that the refusal of admittance contemplated by 18 U.S.C. § 3109 may be present by implication. The court continued in the *McClure* case that there are no set rules as to the time an officer must wait before using force to enter, the answer depending on the circumstances of each case. The *McClure* case involved a commotion following the announcement of purpose by police officers similar to the case at bar, and the court found that these circumstances were such that would convince a reasonable man that permission to enter had been refused.

The court in *McClure* noted in support of this finding, *Masiello* v. *United States,* 317 F. 2d 121, 123 (D.C. Cir. 1963), again containing similar circumstances to the case at bar, as follows:

> "Here the officers were aware that a judicial officer had made a determination, even though tentative and preliminary, that there were reasonable grounds to believe that illegal . . . activity was being carried on. The sounds heard by one officer coming from within the room coupled with the absence of any response tended to confirm what the magistrate had found. Officers of experience . . . were therefore plainly warranted in believing that the 'commotion' which was heard through the door, accompanied by no response following two knocks and one announcement of authority and purpose, meant that the occupants were very likely engaged in what might be called 'standard emergency procedure' of destroying the evidence."

Federal standards were therefore followed in this case. They were followed more than they were in *People* v. *Maddox,* 46 Cal. 2d 301, 294 P. 2d 6, 8 (1956), and the Court denied certiorari, *Maddox* v. *People of the State of California,* 352 U.S. 858 (1956).

CONCLUSION

It is respectfully submitted that petitioners have not shown a violation of any constitutional guarantee, and the petition should be denied.

Respectfully submitted,

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